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10/676,412	09/30/2003	Paul Giampavolo	P3758-17	8071
OSTROLENK, FABER, GERB & SOFTEN, LLP 1180 Avenue of the Americas New York, NY 10036-8403				
EXAMINER CHEN, JOSE V				
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**Please find below and/or attached an Office communication concerning this application or proceeding.**

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**BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES**

Application Number: 10/676,412  
Filing Date: September 30, 2003  
Appellant(s): GIAMPAVOLO ET AL.

Max Moskowitz (30,576)  
For Appellant

**EXAMINER'S ANSWER**

This is in response to the appeal brief filed 12/23/08 appealing from the Office action mailed 03/03/08.

**(1) Real Party in Interest**

A statement identifying by name the real party in interest is contained in the brief.

**(2) Related Appeals and Interferences**

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

**(3) Status of Claims**

The statement of the status of claims contained in the brief is correct.

**(4) Status of Amendments After Final**

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

No amendment after final has been filed.

**(5) Summary of Claimed Subject Matter**

The summary of claimed subject matter contained in the brief is correct.

**(6) Grounds of Rejection to be Reviewed on Appeal**

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

**(7) Claims Appendix**

The copy of the appealed claims contained in the Appendix to the brief is correct.

**(8) Evidence Relied Upon**

5,913,501	HEUSS et al	06-1999
CANADIAN Patent	GIAMPAVOLO et al	PCT Pub Date 12/2000
Application 2,375,246		

**(9) Grounds of Rejection**

The following ground(s) of rejection are applicable to the appealed claims:

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claims 1-4, 6, 7, 9-12, 17, 19, 21, 23, 25-32 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Giampavolo et al ('246) in view of Heuss et al. The patent to Giampavolo et al teaches structure substantially as claimed including a guard

including modular guard sections, joint, the guard sections each having a complimentary portion for the joint for coupling sections together (see at least figs. 2 at 30, 34, 38, 22, fig. 3 at 48, figs. 9, 10, 12) the joint allowing for straight or corner, or pivotal coupling, signage accepting structure, the only difference being that the guard sections does not include a bottom portion wider than the top portion. However, the patent to Heuss et al teaches the use of providing a wedge shaped member to provide better strength and stability. It would have been obvious at the time of the invention to modify the structure of Giampavolo et al to include wedge shaped portions, as taught by Heuss et al since such structures are conventional structures used in the same intended purpose, and further, such modification would have produced predictable results, thereby providing structure as claimed.

#### **(10) Response to Argument**

In response to appellant's remarks regarding the patent to Heuss, note the following. Appellant argues that the structure to Heuss cannot be used as a pallet guard, that Heuss is a stacker base, that Heuss connector members are not couplable to each other. It is noted here that the patent to Heuss is used to teach the use of providing wedge shaped structure to provide a more stable and stronger base structure. It is not used as the primary base reference. The reference to Giampavolo et al is the base reference.

In response to appellant's remarks regarding that the reference to Giampavolo et al fails to teach or suggest each section being couplable to an adjacent section, note the

following. Each section of Giampavolo et al is couplable to an adjacent section as claimed.

In response to appellant's remarks regarding that it would not be obvious to combine the references, note the following. The examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. Express suggestion to substitute one equivalent for another need not be present to render such substitution obvious. As stated in the rejection, a wedge shape base structure to provide an increase strength and stability factor is shown to be old by the teachings of Heuss. To provide such a substitution of the base **shape** in the primary base reference to Giampavolo et al would have been further reasonably predictable and further provided a reasonable expectation of success.

In conclusion, the reference to Giampavolo et al teaches all structure as claimed the only difference of a wedge shaped base being taught by the reference to Heuss. The modification of Giampavolo et al with the teachings of the reference to Huess would have been obvious as stated in the rejection and remarks above.

#### **(11) Related Proceeding(s) Appendix**

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/José V. Chen/

Primary Examiner, Art Unit 3637

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